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No. 48

In the Supreme Court of the United States

October Term, 1950

Hunter Marston, Secretary and Sole Trustee, Local Union No. 1, United Mine Workers of America, Individually and as Representative of All Members of Said Local Union No. 1, United Mine Workers of America, Petitioner,

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and rules involved	2
Statement	4
Argument	9
Conclusion	15

CITATIONS

Cases:

Andrews v. *United States*, 108 F. 2d 511	14
Arroyo v. *United States*, 359 U.S. 419	11
Bell v. *United States*, 349 U.S. 81	13
Bennett v. *United States*, 227 U.S. 333	14
Berger v. *United States*, 295 U.S. 78	14
Cromer v. *United States*, 142 F. 2d 697, certiorari denied, 322 U.S. 760	14
Hanf v. *United States*, 235 F. 2d 710, certiorari denied, 352 U.S. 880	13
Kercheval v. *United States*, 36 F. 2d 766, certiorari denied, 281 U.S. 745	14
Mellor v. *United States*, 160 F. 2d 757, certiorari denied, 331 U.S. 848	13
Rathbun v. *United States*, 236 F. 2d 514, affirmed, 355 U.S. 107	14
Rowan v. *United States*, 281 Fed. 137, certiorari denied, 260 U.S. 721	13
United States v. *Hood*, 200 F. 2d 639	13
United States v. *Illinois Central R. Co.*, 303 U.S. 239	14
United States v. *Pile*, 256 F. 2d 954	14
United States v. *Ryan*, 350 U.S. 299	11, 14

Statutes and rule:

Labor Management Relations Act of 1947, Section 302, 61 Stat. 157, 29 U.S.C. 186 ..... 2, 4, 11, 12
18 U.S.C. 2 3
Rule 8, F. R. Crim. P. 3, 13

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 482

HERBERT FREDERICK, KORHOLZ AND ROCK WOOL INSULATING COMPANY, ALSO KNOWN AS ROCK WOOL INSULATION CORPORATION, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 1a-11a) is reported at 269 F. 2d 897.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1959 (Pet. App. B, 11a). On September 18, 1959, a petition for rehearing was denied but the opinion of the court of appeals was amended by striking a sentence therefrom (Pet. App. C and

D, 11a-12a). The petition for a writ of certiorari was filed on October 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the convictions under Section 302(a) of the Labor Management Relations Act of 1947 for the unlawful payments by an employer to a representative of its employees.

2. Petitioners also raise but do not extensively argue the following questions:

a. Whether the indictment was duplicitous.

b. Whether there was a fatal variance between the allegations and the proof.

c. Whether the trial court properly instructed the jury on the question of wilfulness.

STATUTES AND RULES INVOLVED

Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C. 186, provides in pertinent part:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable * * * (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; * * *.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * * *

18 U.S.C. 2 provides as follows:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Rule 8, F. R. Crim. P., provides in pertinent part:

(a) Joinder of offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

* * * *

STATEMENT

A two-count indictment returned in the District Court for the District of Colorado charged the petitioners, Rock Wool Insulating Company and its president, Herbert F. Korholz, with the payment and delivery of $2,305 to Fred Bierig, the president of Local 146, Teamsters, Chauffeurs, Warehousemen and Helpers of America Union, whose membership included certain employees of Rock Wool, and the unlawful receipt of such money by Bierig, in violation of Section 302(a) and (b) of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C. 186, *supra*. The payments in question were charged as extending from June 15, 1954, to April 17, 1956 (R. 9-10). It was stipulated that Bierig was the president of Local 146 from 1952 to September 12, 1958; that Rock Wool employed labor in an industry affecting commerce; and that Korholz was president of Rock Wool from October 9, 1951, to September 12, 1958 (R. 15-16, 54-55). Following a trial by jury, petitioners and Bierig were found guilty. Each was fined $500, and Korholz and Bierig were sentenced to serve a four-month term of imprisonment (R. 30-32, 221). On appeal, the convictions were affirmed (Pet. App. A, 1a-11a). Bierig does not seek review of his conviction by this Court.

The pertinent facts are as follows:

1. On August 6, 1953, Bierig borrowed $2,000 from a bank in Pueblo, Colorado, and gave his promissory note for $2,060 due in six months (R. 83-85, 117, 125). Korholz was co-maker of the note and signed a "continuing guarantee form" (R. 84-85,

118-119, 129-130).[1] Initially, Bierig paid $60 on the interest and $500 on the principal (R. 117, 125). On February 2, 1954, a renewal note in the amount of $1,515 was issued by the bank (R. 120, 125).[2]

When the indebtedness was not paid on the note, the bank called on Korholz to make good his obligation as co-maker (R. 86, 130; see R. 116, 140-141). Beginning on June 15, 1954, through a series of payments and subsequent note renewals, the entire debt was liquidated by April 17, 1956 (R. 115-116, 121-122). In December 1954, the bank, on authorization by Korholz, advanced an additional $800 to Bierig (R. 127; see R. 206),[3] which sum was included in the amount paid off to the bank. Bierig paid practically all the interest while Rock Wool paid the outstanding principal. On Rock Wool's books the payments were treated in 1954 as an advance to Korholz (R. 148-149), and in 1955 as an advance to the "MPM Investment Company" (R. 149), a company owned and controlled by Korholz (R. 149; see R. 42). In most of the transactions, Rock Wool's account with the bank would be debited and MPM's account cred-

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[1] This form is designed to eliminate the necessity for having the co-maker sign the renewal notes (R. 118).

[2] The record of the trial does not contain any substantial evidence with respect to the initiation of the relationship between petitioner Korholz and Bierig. Bierig's affidavit in support of the motion for a new trial gives his version (R. 20-21).

[3] In his affidavit in support of a motion for a new trial, Bierig stated that Korholz, who had seen Bierig's mother in Germany, gave Bierig the $800 so that he could take a trip to Germany to visit her (R. 28).

ited accordingly. This would enable MPM's account to be debited to the credit of the Bierig note (R. 115-116, 121-122, 126-129; see R. 111-112) for, without the transaction with Rock Wool, MPM's account would not have sufficient funds to cover the payments on the note (R. 115-116). For the year 1956, Rock Wool's books had a "labor relations account" which included the actual payments made on the Bierig note (R. 139). When informed by his accountant that such items were not deductible for tax purposes, Korholz stated that he felt sure that the account was a cost of doing business (R. 139-140). Korholz told a retained accountant in September 1956 that the payments made on the Bierig note were for "labor relations services" (R. 144, 148).

2. It was stipulated that from August 31, 1955, Local Union 146, of which Bierig was president, was designated by the National Labor Relations Board as representing the majority of employees of Rock Wool (R. 15, 52, 55).

Evidence was introduced which indicated that, commencing in late 1953, Rock Wool's truck drivers applied for and were accepted into the membership of Local Union 146 (R. 150-152). During the period covered by the indictment (June 15, 1954-April 17, 1956), Local 146 had union members from Rock Wool's truck drivers (R. 150-152, 155, 157-159, 162, 164-165, 167; see R. 76-80 and Gov. Exs. 38, 39, 40 and 42). These members felt that the union would represent them (R. 155-156, 160, 166, 168-169). Union dues were deducted from their payrolls and paid to the union (R. 152, 154, 161, 166, 170). It

was necessary that some drivers be union workers if they were to make deliveries to union jobs (R. 154). One union member testified that he complained in 1954 to Bierig regarding the working hours of the truck drivers, and that Bierig said that he would do something about it (R. 161-162), although nothing in fact resulted from his conversation (R. 162, 163).[4]

3. In the instructions to the jury, the trial judge charged, in part (R. 232):

> Before there can be a conviction in this case it must be established beyond a reasonable doubt that acts charged in the indictment and in violation of the statute were done knowingly and wilfully. Now, the word "knowingly" as used in the indictment, as used in these instructions means intentionally and with an awareness and consciousness of what one is doing. Now, the word "wilfully" as used in the statute and in the indictment and in these instructions connotes an intentional violation of the law, and you are advised, ladies and gentlemen of the jury, that a defendant who actually does violate the provisions of the law here involved would not be guilty of a criminal offense unless he is either conscious of the fact that what he is doing constitutes a violation of the law or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not.

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[4]The trial judge excluded evidence as to a recognition agreement between the union and Rock Wool from July 1953 until its certification in 1955, on the ground that this would not show that Bierig represented employees (R. 56-72, 178-179).

And further (R. 236):

> You are further instructed that in determining whether or not the acts done by the defendant Herbert Frederick Korholz, if you believe the commission of such acts to have been proved beyond a reasonable doubt, were done wilfully as that term has been heretofore defined in these instructions, you may condition [sic] the fact if it be a fact that on August 6, 1953, the defendant Herbert Frederick Korholz became obligated to pay the indebtedness of the defendant Fred William Bierig to the Arkansas Valley Bank if such indebtedness was not paid by the defendant Fred William Bierig.

On the question of representation, the judge charged (R. 235-236):

> You are further instructed that the word "representative" as used in Section 186 of the National Labor Relations Act and elsewhere in these instructions is used in its ordinary everyday meaning and means a labor representative. As such it includes any person who is empowered, authorized or designated in any way, directly or indirectly, by any employee or employees to represent such employee or employees in any matter relating to their wages or hours or working conditions by standing in place of such employee or employees in any responsible dealings with the employer involving such matters. If a person be so authorized to act, it is not necessary that he actually exercise all or any of the powers conferred upon him. Any labor organization such as a local union, which is empowered, authorized or designated by any employee or employees to act on his or their behalf

in dealing with the employer with respect to hours, wages or working conditions is by virtue thereof a representative of such employee or employees, and any individual, who actively holds and occupies an office or position of responsibility in any such local union, who is empowered or authorized in such office or position to act for any such labor organization in which he holds office in such way as to affect any such employee in a substantial way in any dealings with the employees' employer with respect to hours of labor, wages or working conditions is thereby also a representative of such employee or employees.

ARGUMENT

1. The gist of petitioners' arguments with respect to the first three questions they present (Pet. 3-4) is that the evidence in this case does not support the verdict. The contention is that there is no evidence that the original signing of the note by Korholz in the summer of 1953 was illegal since there was no proof that any Rock Wool employee was a member of the union at that time; and that the subsequent payments of the note from June 1954 to April 1956 must be deemed merely a discharge of Korholz's personal legal obligation on the note, and not a payment by the employer (Rock Wool) to a representative of its employees (Bierig).

This argument fails to take account of certain facts in the record and assumes other facts not in the record. For one thing, it omits the salient fact that in December 1954, when the union clearly did represent some truck drivers (see Gov. Exs. 38, 39,

40 and 42), only seven months before the union became the designated bargaining agent, Korholz authorized an additional loan to Bierig of $800, which Rock Wool subsequently paid (*supra*, p. 5). In no sense can this additional $800 be considered as discharging any obligation incurred by Korholz in 1953; it was a new transaction. Moreover, even as to the original note, the fact is that Rock Wool did not start to make the payments until June 1954, at which time drivers for Rock Wool were members of Bierig's union and union dues were being deducted by the company and paid to the union. Petitioners assert that Bierig was in financial straits at the time, but they presented no evidence to that effect to the jury.[5] As the trial judge pointed out in chambers in the argument on the motion for judgment of acquittal (R. 210), it was for the jury to decide whether petitioner Korholz was merely paying off his own personal legal obligation or was using this as a method of paying money to Bierig (in violation of the Act). The judge did charge the jury that, on the issue of knowledge, they could take into consideration the fact that Korholz had a pre-existing

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[5] Petitioners now rely on Bierig's affidavit in support of the motion for a new trial (R. 20-29). If that affidavit could be considered at all, it would also be necessary to consider Bierig's allegation that in May 1953 he did talk with Korholz about a recognition agreement with Rock Wool; that in July 1953 Bierig and Graf (secretary-treasurer of the union) took a trip to various building and trades councils to help increase sales for Rock Wool; and that certification of Bierig's local in August 1955 came after the United Mine Workers started organizing Rock Wool employees (R. 22-21).

legal obligation on the note (see the Statement, *supra*, p. 8). But the jury had the right to consider all the circumstances—the time and setting when Rock Wool started to make payments on the notes in June 1954; the authorization of the additional $800 loan in December 1954 although Bierig was then in default; and the characterization of the payments on the books of Rock Wool (and in Korholz's statements to the accountants) as being for labor relations services. Together, these circumstances adequately support the jury's conclusion that the total picture showed that an employer of labor did not merely discharge the pre-existing personal obligation of its president, but that the employer knowingly made payments to a representative of its employees on its own behalf.*

As this Court pointed out in *United States* v. *Ryan*, 350 U.S. 299, Section 302(a) punishes as a misdemeanor the giving of money by an employer to a representative of employees, without any requirement of proof of improper motive or attempt

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* Section 302(c) contains five exceptions to the unlawful payments between employer and the representative of its employees which Congress has proscribed in Section 302(a) and (b) (*Arroyo* v. *United States*, 359 U.S. 419, 420). One of the exceptions, Section 302(c)(2), *supra*, allows the employer to pay to the representative of its employees the judgments, arbitration awards, or, if the dispute has not reached a final, formal decision, payments in settlement or compromise of outstanding claims or disputes (between labor and management). Payments to liquidate the *bank's* claim—if they constituted, in reality, payments to a labor representative not in settlement of *his* claim against the employer—fall outside the ambit of Section 302(c)(2).

to exercise influence. An employer is flatly prohibited from making gifts to an employee representative. The jury could properly find in this case that the payments were the kind of gift the statute prohibits.[7]

Similarly, the judge under proper instructions submitted to the jury the issue of whether Bierig was a representative of employees (see the Statement, *supra*, pp. 8-9). The record indicates that a number of truck drivers, all company employees, were members of Local 146 and had their dues deducted from the payrolls, even before the August 1955 certification; that the truck driver-members felt that the union would represent them; that dues were deducted from their paychecks by Rock Wool; that on one occasion Bierig told a member that he would do something about a member-complaint (although nothing in fact resulted from the conversation) (see the Statement, *supra*, pp. 6-7). The jury had ample evidence to support its finding that Bierig was a representative of Rock Wool's employees, within the meaning of Section 302 as interpreted by this Court in *Ryan, supra*.

2. Petitioners save but do not extensively argue several points (Pet. 20-21). None merits review here.

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[7] Contrary to petitioners' assertion (Pet. 16), there is substantial evidence of the nature of the financial relationship between Rock Wool and Korholz as to the payments on this loan (see the Statement, *supra*, p. 5-6). That Korholz knew he was having the company make payments to Bierig, including payments on the $800 increase in December, is clear on this record. On this point, that is all that is necessary in order to prove the violations by these petitioners.

a. They contend that the indictment is duplicitous and offends Rule 8(a), F. R. Crim. P., *supra*, in that it "alleges a number of alleged offenses [*i.e.*, numerous payments on the note], thus depriving the petitioners of the opportunity to make a defense against a particular alleged violation." But as the court below noted, the gravamen of the charge was the payment of money in violation of the statute. The proof was that the payments were made through a series of transactions (Pet. App. A, 4a). It would hardly be to petitioners' advantage to have each payment treated as a separate offense. A count is not bad for duplicity where it charges the commission of several acts, which alone may constitute distinct offenses. *United States* v. *Hood*, 200 F. 2d 639, 641 (C.A. 5); *Hanf* v. *United States*, 235 F. 2d 710, 715 (C.A. 8), certiorari denied, 352 U.S. 880; *Mellor* v. *United States*, 160 F. 2d 757, 762 (C.A. 8), certiorari denied, 331 U.S. 848; *Rowan* v. *United States*, 281 Fed. 137, 139 (C.A. 5), certiorari denied, 260 U.S. 721. See *Bell* v. *United States*, 349 U.S. 81, 83-84.

b. Petitioners also argue (Pet. 21) that there was a "fatal variance" between the allegations charging a payment of money to a representative of the employees and the proof showing the payments on the Bierig note to the bank.

There can, however, be no doubt that Bierig directly benefited financially from the payments. We believe that there was no variance, but in any event petitioners cannot show that they were prejudiced by the proof of payment to the bank; any variance

in this respect was harmless. Cf. *Berger* v. *United States*, 295 U.S. 78, 82; *Bennett* v. *United States*, 227 U.S. 333, 338; *Kercheval* v. *United States*, 36 F. 2d 766 (C.A. 5), certiorari denied, 281 U.S. 745; *United States* v. *Pile*, 256 F. 2d 954, 957 (C.A. 7); *Rathbun* v. *United States*, 236 F. 2d 514, 516 (C.A. 10), affirmed, 355 U.S. 107; *Cromer* v. *United States*, 142 F. 2d 697, 698 (C.A. D.C.), certiorari denied, 322 U.S. 760; *Andrews* v. *United States*, 108 F. 2d 511, 515 (C.A. 4).

c. Finally, petitioners seek review of the trial court's instructions on the definition of "wilfully" (see the Statement, *supra*, pp. 7-8). They proffered their own instruction on the definition of "wilfully" as meaning with "bad purpose" or "bad motive", which was rejected by the trial court (R. 223). As the court below pointed out (Pet. App. A, 10a-11a), the offenses charged are *malum prohibitum*. *United States* v. *Ryan*, 350 U.S. 299, 305. Instructions on the definition of "wilfully" as meaning "intentional" or voluntary were therefore proper. *United States* v. *Illinois Central R. Co.*, 303 U.S. 239, 242-243.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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